

L.E., Appellant

**DEPARTMENT OF DEFENSE, DEFENSE
SUPPLY CENTER, Philadelphia, PA Employer**

Appearances:

Case Submitted on the Record

Before:

The record indicates that OWCP accepted that appellant sustained bilateral upper extremity strains and neuropathies. Appellant retired from the employing establishment on October 11, 2003. On May 31, 2006 she claimed a schedule award. With regard to determining the appropriate percentage of bilateral arm impairment, OWCP found a conflict in the medical evidence between attending physician, Dr. David Weiss, and Dr. Brad K. Cohen, an OWCP second opinion physician.¹

¹ FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

To resolve the conflict, OWCP selected Dr. Kenneth Easterling, a Board-certified orthopedic surgeon, as referee physician.² The Board finds, however, that the record does not establish whether Dr. Easterling was properly selected as a referee physician in accord with OWCP procedures.

A physician selected by OWCP to serve as a referee should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of referee physicians designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that referee's will be selected on a strict rotating basis through the Physicians Directory System (PDS) in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.³

It is well established that OWCP has an obligation to verify that it selected Dr. Easterling in a fair and unbiased manner. It maintains records for this very purpose.⁴ The current record includes only a March 22, 2011 ME023 report (Appointment Schedule Notification) that lists Dr. Easterling as the selected physician. There are no other documents, screen captures or any other evidence showing how the PDS system was used to properly select Dr. Easterling in accordance with the strict rotational system used to select a referee physician.

The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.⁵ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures in this case.⁶

The Board will remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, OWCP shall issue an appropriate decision.

² The Board notes that Dr. Easterling was the third impartial medical specialist OWCP selected in this case. OWCP initially selected Dr. Mitchell Pollak as an impartial medical examiner. In a December 1, 2008 decision, an OWCP hearing representative excluded Dr. Pollak's opinion due to improper contact between OWCP and the physician's office, necessitating appointment of a new impartial medical specialist. On December 8, 2008 OWCP selected Dr. Keith Kurland as an impartial medical examiner. Due to difficulties with electrodiagnostic testing and development of the medical evidence, OWCP issued a March 16, 2011 decision directing the selection of a new impartial medical specialist.

³ See *Raymond J. Brown*, 52 ECAB 192 (2001).

⁴ *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

⁵ See *D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

⁶ An ME023 form is not sufficient documentation that OWCP properly followed its selection procedures. *D.A.*, Docket No. 12-311 (issued July 25, 2012); *C.P.*, Docket No. 10-1247 (issued September 28, 2011, *petition for recon. denied* May 15, 2012).

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2012 is set aside and the case remanded for further action consistent with this order of the Board.

Issued: November 13, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board